Chapter 4: MEPA and the Courts

CHAPTER SUMMARY

< The total number of MEPA cases resolved by state courts over a 29-year period totals 27 (**Figure 4-1**).The state's total winning percentage in MEPA cases, excluding split decision cases, is 68%. Note that many MEPA cases also litigate other state laws in addition to MEPA. Fourteen, or 51%, of the MEPA cases have been litigated between the years of 1990 and 2000 (**Figure 4-1**). According to state legal counsel, there have been a total of four MEPA cases that have been dropped or settled (not resolved by a state court) over a 29-year period. There are currently eight cases involving MEPA issues pending in District Court and one case pending in the Montana Supreme Court.

< Generally, MEPA issues resolved by the state courts can be lumped into three basic categories:

(1) Should the state agency have conducted a MEPA analysis (EA or EIS)?

(2) Was the MEPA analysis adequate?

(3) Does MEPA supplement a state agency's permitting/licensing authority?

The most commonly litigated MEPA issue (17 out of 27 MEPA cases) is whether the state agency should have conducted a MEPA analysis, usually an EIS (**Tables 4-1 and 4-2**). The second most commonly litigated MEPA issue (9 out of 27 MEPA cases) is whether the state agency's MEPA review (EIS or EA) was adequate.

< **Table 4-3** illustrates those categories of state actions that elicit the most MEPA litigation. State timber sales and mining permits rank first and second in total number of lawsuits, with nine and seven lawsuits respectively. If state land activities (timber sales, oil and gas leases, grazing leases, and easements) are lumped together, they garner the majority of MEPA litigation with a total of 12 lawsuits.

- On the question of whether, in light of the Supreme Court's decision construing the environmental provisions of the Constitution, MEPA is consider substantive, the short answer to this question is “no, not yet”. This case did not involve a MEPA issue. It is speculation at best to say what the Supreme Court would conclude on this issue.

- On the question of whether, in light of the Supreme Court's decision construing the environmental provisions of the Constitution, MEPA would increase or decrease potential litigation, the panel of state agency and plaintiff attorneys were split in their opinions.

- State agency attorneys and a plaintiff's attorney were also split in their individual opinions as to whether new evidence issues were a problem or not.

Chapter 4: MEPA and the Courts

Introduction

SJR 18 requests that the EQC ensure that the MEPA process results in state agencies making legally defensible and ultimately better decisions. The EQC took this study mandate very seriously, requesting a detailed staff review and analysis of all MEPA litigation and holding a series of state agency and MEPA plaintiff attorney panel discussions on a variety of MEPA and constitutional litigation issues. This chapter reflects EQC-generated information on this subject. EQC findings and recommendations on MEPA litigation can be found in **Chapter 10**.

Basics of MEPA Litigation

A typical MEPA case involves a person or entity (the **plaintiff**) filing suit against a state agency asking the state court to:

(1) declare an agency's action invalid (**declaratory judgment**);

(2) stop the agency from doing something (**injunctive relief**); and/or

(3) tell the state agency to do something it had a clear legal duty to do in the first place (**mandamus**).

Before a court ever gets to these issues however, a MEPA plaintiff must be allowed through the courtroom doors. That is to say that a MEPA plaintiff must have "standing" to sue the state agency in the first place. A state court will first look to see if the statute at issue provides a MEPA plaintiff with standing. If it does not, the state court will make a determination as to whether the MEPA plaintiff has alleged a personal and sufficient stake in the outcome of the case that can be resolved by a court. The Montana courts like the federal courts, have, in general, been liberal in granting standing.

Although the remedy of mandamus has been attempted in many MEPA cases over the years, the courts tend to conclude that mandamus is not usually an appropriate remedy in MEPA cases because many agency MEPA decisions and actions are discretionary. Mandamus is a remedy that can only be used for nondiscretionary actions.

When a court makes a determination as to whether to issue an injunction or declare an agency's action invalid, the court usually determines whether the state agency:

(1) violated a statute or regulation (**acted unlawfully**); or

(2) did not consider relevant factors and made a clear error in judgment (**acted arbitrarily and capriciously**).

According to the Montana Supreme Court, state courts may not substitute their judgment for that of a state agency but must examine the agency's decision to see whether the information set out in the record was considered or whether the agency's decision was so at odds with that information that it could be characterized as arbitrary and capricious.

State courts generally look at the MEPA statute, the agency's MEPA administrative rules, and the administrative record to determine if the agency acted unlawfully. If MEPA or the rules do not provide adequate direction, the courts look to federal statutory, regulatory, and case law on the National Environmental Policy Act (NEPA) for guidance. If the courts find that the agency acted unlawfully, the inquiry usually ends and the plaintiff is granted relief.

A court could find that an agency acted lawfully but still grant the plaintiff relief because the agency acted arbitrarily and capriciously. A court will look at the administrative record, which usually involves an analysis of the MEPA review document, to determine whether the agency's action was a clear error in judgment and thus arbitrary and capricious.

A few jurisdictional basics are appropriate here. Supreme Court decisions are binding statewide. District Court decisions are binding on the parties and within the district in which the decision is made. First Judicial District Court decisions are not only binding within the First Judicial District but are binding and set precedent for state agencies and the actions those agencies take across the state.

Analysis of State Court Decisions

For the purposes of this analysis, a "MEPA case" is defined as litigation in state court in which a state agency is challenged on a MEPA issue and that legal issue is ultimately resolved by the court.

Over MEPA's 29-year history, the Montana Supreme Court has been called upon to review the Act seven times (**Table 4-1**). The state has prevailed in five out of those seven cases, or 71% of the cases. According to EQC and state agency records, MEPA has been litigated and resolved in the Montana District Courts 20 times and the state has prevailed in 12 of those cases with two split decisions (**Table 4- 2**). The total number of MEPA cases resolved by state courts over a 29-year period totals 27 (**Figure 4-1**). The state's total winning percentage in MEPA cases, excluding split decision cases, is 68%. Note that many of MEPA cases also litigate other state laws in addition to MEPA. Fourteen, or 51%, of the MEPA cases have been litigated between the years of 1990 and 2000 (**Figure 4-1**). According to state legal counsel, there have been a total of four MEPA cases that have been dropped or settled (not resolved by a state court) over a 29-year

period. There are currently eight cases involving MEPA issues pending in District Court and one case pending in the Montana Supreme Court.

Figure 4-1. MEPA Cases Litigated Over Time

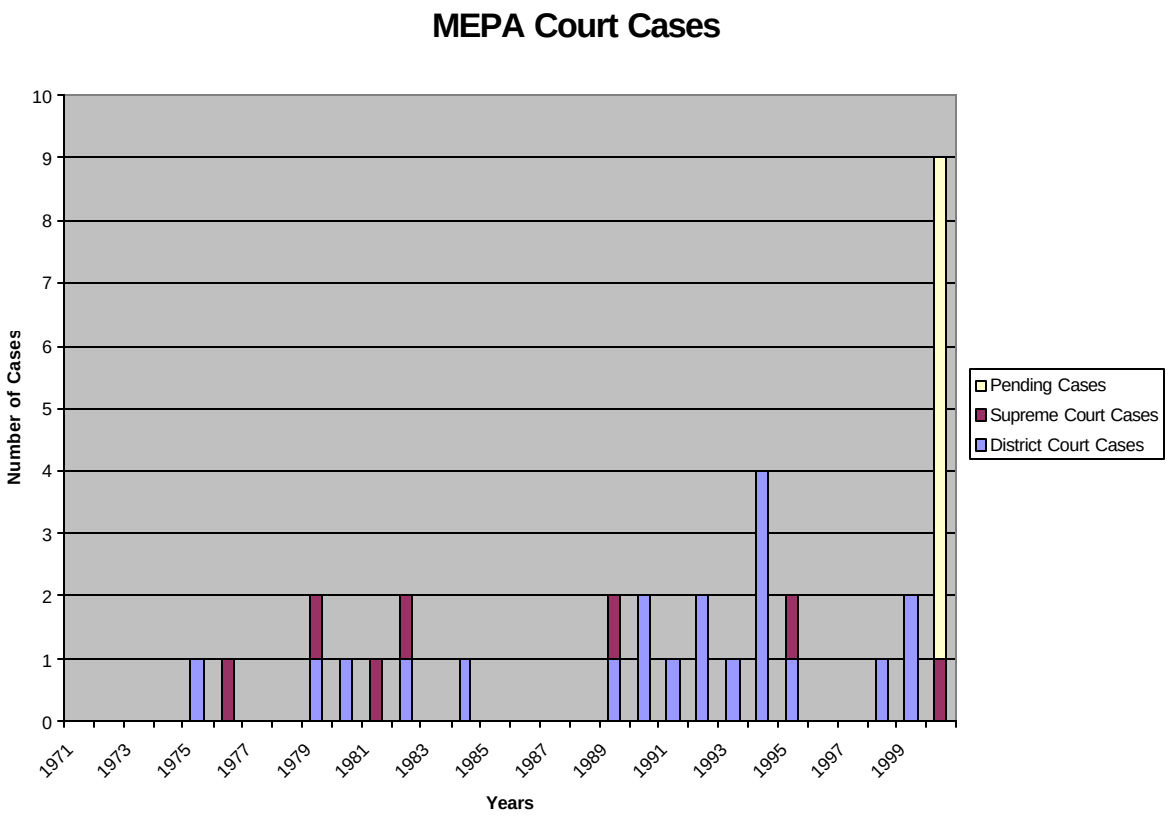

Table 4-1. Montana Supreme Court MEPA Cases

Supreme Court Case	MEPA Issue Litigated/Court Decision	State Wins	State Loses	Split Decision
Montana Environmental Information Center v. Dept. of Transportation, 2000 MT 5; Decided 2000	Should the agency have conducted a MEPA analysis (a supplemental EIS? Court Decision: Yes		X	
Ravailli County Fish and Game Association v. Dept. of State Lands, 273 M 371, 903 P2d 1362; Decided 1995	Should the agency have conducted a MEPA analysis (an EA or EIS)? Court Decision: Yes		X	
North Fork Preservation Association v. Dept. of State Lands, 238 M 451, 778 P2d 862; Decided 1989	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: No Was the MEPA analysis (a preliminary environmental review) adequate? Court Decision: Yes	X		
Montana Wilderness Association v. Board of Natural Resources and Conservation, 200 M 11, 648 P2d 734; Decided 1982	Was the MEPA analysis adequate? Court Decision: Yes	X		
Titeca v. Dept. of Fish, Wildlife, and Parks, 194 M 209, 634 P2d 1156; Decided 1981	Does a preliminary environmental review require a public hearing? Court Decision: No	X		
Kadillak v. The Anaconda Company, 184 M 127, 602 P2d 147; Decided 1979	Should the state agency have conducted a MEPA analysis (an EIS)? Court Decision: No	X		
Montana Wilderness Association v. Board of Health and Environmental Sciences, 171 M 477, 559 P2d 1157; Decided 1976	Does MEPA supplement a state agency's permitting/licensing authority? Court Decision: No	X		
	TOTAL	5	2	0

Table 4-2. District Court MEPA Cases

District Court Case	MEPA Issue/Court Decision	State Wins	State Loses	Split Decision
Skyline Sportsmen's Association v. Board of Land Commissioners, BDV 99-146, 1st District, Judge Sherlock; Decided 9-16-1999	Should the agency have conducted a MEPA analysis (a supplemental EIS)? Court Decision: No Was the MEPA analysis (an FEIS) adequate? Court Decision: Yes and No			X
Little Snowies Coalition v. Dept. of Natural Resources and Conservation, BDV 99-10, 1st District, Judge Sherlock; Decided 2-12-1999	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: No Was the MEPA analysis (an EA) adequate? Court Decision: Yes	X		
Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, CDV 97-558, 1st District, Judge Honzel; Decided 12-23-1998	Was the MEPA analysis (an EIS) adequate? Court Decision: No Should the agency have conducted a MEPA analysis (a supplemental EIS)? Court Decision: Yes		X	
Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, CDV 95-314, 1st District, Judge Honzel; Decided 12-13-1995	Can a court order a date certain for the completion of a MEPA analysis (a programmatic EIS)? Court Decision: No Should the agency be permanently enjoined from conducting further timber sales pending the completion of a MEPA analysis (a programmatic EIS)? Court Decision: No	X		
National Wildlife Federation v. Dept. of State Lands, CDV 92-486, 1st District, Judge Honzel; Decided 9-1-1994	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: Yes		X	

Table 4-2 continued

District Court Case	MEPA Issue/Court Decision	State Wins	State Loses	Split Decision
Wallace v. Dept. of Fish, Wildlife, and Parks, DV 93-356, 21st District, Judge Langton; Decided 1-10-1994	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: Yes	X		
Mott v. Dept. of State Lands, CDV 93-1731, 1st District, Judge Honzel; Decided 6-24-1994	Was the MEPA analysis (an EA) adequate? Court Decision: Yes	X		
Friends of the Wild Swan v. Dept. of State Lands, DV 93-361-B, 11th District, Judge McKittrick; Decided 2-9-1994	Was the MEPA analysis (an EA) adequate? Court Decision: No Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: Yes		X	
Kilpatrick v. Dept. of Fish, Wildlife, and Parks, BDV 93-637, 1st District, Judge Sherlock; Decided 8-11-1993	Does MEPA supplement a state agency's permitting /licensing authority? Court Decision: Yes	X		
Murphy v. Dept. of Health and Environmental Sciences, BDV 92-1204, 1st District, Judge Sherlock; Decided 11-20-1992	Does an environmental assessment require that an agency conduct a public hearing? Court Decision: No	X		
Gold Creek Resource Protection Association v. Dept. of State Lands, Cause No. 76549, Consent to Judgment, 4th District; Entered 10-20-1992	Was the MEPA analysis adequate? Consent to Judgment: No		X	
Friends of the Wild Swan v. Dept. of State Lands, DV 89-074(A), 11th District, Judge Keller; Decided 10-17-1991	Was the MEPA analysis (EIS) adequate? Court Decision: Yes Should the agency have conducted a MEPA analysis (an EA or EIS)? Court Decision: No	X		

Table 4-2 continued

District Court Case	MEPA Issue/Court Decision	State Wins	State Loses	Split Decision
Westview People's Action Association v. Dept. of State Lands, Cause No. 72690, 4th District, Judge Harkin; Decided 6-27-1990	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: No	X		
Concerned Citizens of Pony v. Dept. of Health and Environmental Sciences, ADV 90-144, 1st District, Judge McCarter; Decided 3-30-1990	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: No	X		
Upper Yellowstone Defense Fund v. Dept. of Health and Environmental Sciences, BDV 89-261, 1st District, Judge Sherlock; Decided 5-12-1989	Was the MEPA analysis (an EIS) adequate? Court Decision: Yes	X		
Montana Environmental Information Center v. Montana Power Company, Cause No. 49784, 1st District, Judge Gary; Decided 2-16-1984	Should the agency have conducted a MEPA analysis (a preliminary environmental review)? Court Decision: Yes		X	
Cabinet Resource Group v. Dept. of State Lands, Cause No. 43914, 1st District, Judge Bennett; Decided 9-29-1982	Does MEPA supplement a state agency's permitting /licensing authority? Court Decision: Yes		X	
Friends of the Earth v. Dept. of State Lands, Cause No. 44384, 1st District, Judge Wheelis; Decided 4-2-1980	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: The possibility of mandamus exists to compel the agency to conduct an EIS but the court does not dismiss the case on this issue.			X
Guthrie v. Dept. of Health and Environmental Sciences, Cause No. 7118, 9th District, Judge McPhillips; Decided 3-1979	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: No	X		

Table 4-2 continued

District Court Case	MEPA Issue/Court Decision	State Wins	State Loses	Split Decision
Montana Wilderness Association v. Board of Land Commissioners, Cause No. 38544, 1st District, Judge Bennett; Decided 4-17-1975	Are EQC guidelines binding on state agencies? Court Decision: No Should the agency have conducted a MEPA analysis? Court Decision: No	X		
	TOTAL	12	6	2

Each MEPA suit has its own cause and effect, but generally MEPA issues resolved by the state courts can be lumped into three basic categories:

(1) Should the state agency have conducted a MEPA analysis (EA or EIS)?

(2) Was the MEPA analysis (EA or EIS) adequate?

(3) Does MEPA supplement a state agency's permitting/licensing authority?

Only four cases fell outside of the above categories. *Montana Wilderness Association v. Board of Land Commissioners* (1975) not only dealt with the issue of whether a state agency should have conducted an EIS, but also whether EQC MEPA guidelines were binding on state agencies. The court held that EQC guidelines were not binding on state agencies. The courts, in *Titeca v. Dept. of Fish, Wildlife, and Parks* (1981) and *Murphy v. Dept. of Health and Environmental Sciences* (1992), ruled that a preliminary environmental review and an environmental assessment do not require that an agency conduct a public hearing. In *Friends of the Wild Swan v. Dept. of Natural Resources and Conservation* (1995), the question arose as to whether the court could order a date certain for the completion of a Programmatic EIS by a state agency. The court declined to do so.

The most commonly litigated MEPA issue (17 out of 27 MEPA cases) is whether the state agency should have conducted a MEPA analysis, usually an EIS (**Tables 4-1 and 4-2**). The court decisions have been evenly spit on this issue, with nine decisions holding that the agency either need not have conducted a MEPA analysis or was not required to conduct an EIS. Eight court decisions held that the agency was either required to conduct a MEPA analysis or that the agency should have done an EIS. At the heart of this issue is whether the state agency made the proper “significance” determination of the impacts. The court will generally review the record to see whether the agency’s significance determination of the impacts was reasonable in light of the significance criteria set out in the agency’s administrative rules.

The second most commonly litigated MEPA issue (9 out of 27 MEPA cases) is whether the state agency's MEPA review (EIS or EA) was adequate. Again the court will review the record to determine whether the agency complied with the statute and its own MEPA rules in writing the MEPA review document. Adequacy issues that the courts have reviewed include cumulative impacts, alternatives, cost-benefit analysis, impact analysis generally, and economic impact analysis. Of special note, the issue of cumulative impacts has been litigated in eight cases. The state has been upheld on its analysis of cumulative impacts in six out those eight cases. The issue of adequate alternatives analysis has been litigated in four cases. The courts upheld the adequacy of the state's alternative analysis in three out of those four cases.

Three MEPA cases directly analyzed and ruled on the issue of whether MEPA supplements an agency's permitting/licensing authority or is strictly procedural--meaning that MEPA does not dictate a certain result. MEPA is generally considered to be a procedural act by state courts. The Supreme Court, in *Montana Wilderness Association v. Board of Health and Environmental Sciences (1976),* held that MEPA did not supplement DHES's permitting authority under the Montana Subdivision and Platting Act. However, the First Judicial District has determined that MEPA is substantive (supplements an agency's permitting authority) under the Hard-Rock Mining Act, section 82-4-351, MCA (*Cabinet Resource Group v. Dept. of State Lands (1982*)) and under the game farm (now alternative livestock ranch) licensing and roadside zoo/menagerie permit statutes (*Kilpatrick v. Dept. of Fish, Wildlife, and Parks (1993)*). This issue of whether MEPA is substantive or procedural is extensively analyzed in **Chapter 6**.

The Supreme Court, in *Kadillak v. The Anaconda Company (1979)*, and the Fourth Judicial District, in *Westview People's Action v. Dept. of State Lands (1990)*, have held that when there is a clear and unavoidable conflict in statutory authority between MEPA and another statute, MEPA must give way. Specifically a statutory time limit (in a permitting statute for example) precludes the agency's statutory duty to prepare an environmental impact statement. See the examples in **Chapter 8** of statutory timeframes that make it difficult for agencies to conduct a MEPA analysis.

Table 4-3 illustrates those categories of state actions that elicit the most MEPA litigation. State timber sales and mining permits rank first and second in total number of lawsuits, with eleven and seven lawsuits respectively. If state land activities (timber sales, oil and gas leases, grazing leases, and easements) are lumped together, they garner a majority of the MEPA litigation with a total of 15 lawsuits.

Table 4-3. Categories of State Actions Most Subject to MEPA Litigation

State Action	Past Lawsuits	Pending Lawsuits	Total Lawsuits
Timber Sales (State Land)	8	3	11
Mining Permits	5	2	7
Alternative Livestock Ranch/Zoo Menagerie Permits	2	1	3
Water Quality, Public Water, and Waste Water Permits	2	1	3
Facility Siting Certification	2	0	2
Oil and Gas Leases (on State Land)	1	0	1
State Land Grazing Lease	1	0	1
Granting of an Easement on State Land	1	1	2
Subdivision Review	2	0	2
Fishing Access Site	1	0	1
Solid Waste	1	0	1
State Road Construction	1	0	0
TOTAL	27	8	34

Legislative Action Dealing With MEPA Litigation Issues

The Legislature over time has made it somewhat tougher for a plaintiff to both litigate a MEPA case and to win a MEPA case against a state agency.

Two bills (SB 288 in 1995 and HB 142 in 1999) passed by the Legislature specifically dealt with MEPA litigation issues. These bills clarified that the burden of proof is on the person challenging an agency's decision that an environmental review is not required or that the environmental review is inadequate and that in a challenge to the adequacy of an environmental review, a court may not consider any issue or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. SB 288 (Chapter 331, Laws of 1995) also required that a court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law.

In addition, HB 142 (Chapter 223, Laws of 1999) required that when new, material, and significant evidence is presented to the District Court that had not previously been presented to the agency for its consideration, the District Court shall remand the new evidence back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the District Court considers the evidence within the administrative record under review. Immaterial or insignificant evidence may not be remanded to the agency. The District Court must review the agency's

findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review.

In 1995 the Legislature passed two bills that did not specifically amend MEPA but make it potentially more difficult to litigate MEPA cases. Set out below are the statutory provisions enacted in 1995:

> **27-19-306. Security for damages.** (1) Subject to 25-1-402, on granting an injunction or restraining order, the judge shall require a written undertaking to be given by the applicant for the payment of the costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Except as provided in subsection (2), the undertaking:
>
> (a) must be fixed at a sum that the judge considers proper; and
>
> (b) may be waived:
>
> (i) in domestic disputes; or
>
> (ii) in the interest of justice.
>
> (2) (a) If a party seeks an injunction or restraining order against an industrial operation or activity, the judge shall require a written undertaking to be filed by the applicant. The amount of the written undertaking must be set in an amount that includes all of the wages, salaries, and benefits of the employees of the party enjoined or restrained during the anticipated time that the injunction or restraining order will be in effect. The amount of the written undertaking may not exceed $50,000 unless the interests of justice require. The written undertaking must be conditioned to indemnify the employees of the party enjoined or restrained against lost wages, salaries, and benefits sustained by reason of the injunction or restraining order.
>
> (b) As used in subsection (2)(a), "industrial operation or activity" includes but is not limited to construction, mining, timber, and grazing operations.
>
> (3) Within 30 days after the service of the injunction, the party enjoined may object to the sufficiency of the sureties. If the party enjoined fails to object, all objections to the sufficiency of the sureties are waived. When objected to, the applicant's sureties, upon notice to the party enjoined of not less than 2 or more than 5 days, shall justify before a judge or clerk in the same manner as upon bail on arrest. If the sureties fail to justify or if others in their place fail to justify at the time and place appointed, the order granting the injunction must be dissolved.
>
> (4) This section does not prohibit a person who is wrongfully enjoined from filing an action for any claim for relief otherwise available to that person in law or equity and does not limit the recovery that may be obtained in that action.

77-1-110. Written undertaking required in legal action for challenge to use or disposition of state lands. In any civil action seeking an injunction or restraining order concerning a decision of the board approving a use or disposition of state lands that would produce revenue for any state lands trust beneficiary, the court shall require a written undertaking for the payment of damages that may be incurred by the trust beneficiary if the board is wrongfully enjoined or restrained.

The Montana State Courts: MEPA and the Environmental Provisions of Montana's Constitution

Overview of State Court Decisions

The interrelationship between the environmental provisions of Montana's Constitution and MEPA have been discussed and, to some limited extent, analyzed over the years in state court decisions. Set out below is a summary of that analysis and discussion.

The environmental provisions of Montana's Constitution that are usually cited in state court cases include:

Article II, section 3. Inalienable rights. All persons are born free and have certain inalienable rights. They include *the right to a clean and healthful environment* and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, *health* and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities. (emphasis added)

Article IX, section 1. Protection and improvement. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

(2) The legislature shall provide for the administration and enforcement of this duty.

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

The Montana Supreme Court has discussed the environmental provisions of the Constitution and their relation to MEPA in only one case: *Kadillak v. The Anaconda Company (1979)*. In *Kadillak*, the Court noted that the EIS provisions of MEPA have not been given constitutional status. The Court specifically states:

> Both the MEPA and the HRMA predate the new constitution. There is no indication that the MEPA was enacted to implement the new constitutional guarantee of a "clean and healthful environment." This Court finds that the statutory requirement of an EIS is not given constitutional status by the subsequent enactment of this constitutional guarantee. If the legislature had intended to give an EIS constitutional status they could have done so after 1972.

Judge Honzel, in *Friends of the Wild Swan v. Dept. of Natural Resources and Conservation* (1998), said that the environmental provisions of the Constitution mean something. He states:

> This Court has previously held that the right to a clean and healthful environment as stated in Article II, Section 3, and Article IX, Section 1, is self-executing, and that "all persons" affected by state action which degrades the environment have recourse to the courts. See Montana Wildlife Federation v. Dep't of State Lands, Docket No. CDV-92-486, Order entered May 28, 1993. The right to a clean and healthful environment is inalienable and has substance.
>
> However, in the instant action, FWS [Friends of the Wild Swan] has not shown that DNRC's proposed action will result in an unclean, unhealthful environment. Consequently, the Court is unable to discern the grounds on which FWS bases its claim. If FWS is alleging that DNRC is violating the Constitution by degrading the water quality, stemming from its allegation that DNRC failed to prepare an adequate watershed analysis, then that argument must fail. If FWS is simply alleging that the proposed harvesting of old growth timber will result in an unclean, unhealthful environment, there is insufficient evidence in the record to support that claim. Therefore, the Court concludes that FWS has failed to prove a constitutional violation.

Judge Honzel, in *National Wildlife Federation v. Dept. of State Lands* (1994), also states that the constitutional right to a clean and healthful environment indicates a strong public policy in favor of environmental protection and that MEPA plays a role in determining whether these constitutional provisions have been abridged. He specifically states:

> The state of Montana not only has its own environmental policy act, but it has specific constitutional guarantees respecting the environment as well. (Art. II, § 3, and Art. IX, §§ 1 and 2, Mont. Const.) That the people's right to a clean and healthy environment has been elevated to constitutional status in this state indicates a strong public policy in favor of environmental protection. As this Court has said previously, these constitutional provisions mean something. The Court concludes, therefore, that the constitutional and

> legislative policies embodied in MEPA strongly favor independent review of cases such as this.
>
> The fact that this is a large open pit mining operation which will eliminate a portion of the Bull Mountains does not necessarily violate the constitution. The issue is whether such an operation constitutes an "unreasonable depletion and degradation of natural resources." That is a factual issue for which summary judgment is not appropriate.
>
> The EA certainly indicates that there is a significant potential for pollution of the Jefferson River. DSL contends that there will not be any pollution because of the stipulations attached to the permit. This creates a factual dispute and, again, summary judgment is not appropriate.
>
> The Court has concluded that DSL should have required an EIS and that it did not follow the provisions of the MMRA. Arguably, the failure to require an EIS and the failure to comply with the MMRA constitute violations of Article IX, Section 1. The remedy, however, would be for DSL to comply with MEPA and the MMRA. Plaintiffs have not shown that those remedies are inadequate. The Court concludes, therefore, that it is not necessary to find that DSL has violated Article IX, § 1.

Judge Langton, in *Wallace v. Dept. of Fish, Wildlife, and Parks (1994)*, held as a conclusion of law that MEPA does implement the environmental provisions of the Constitution, stating that:

> The Montana Constitution requires the Legislature to "provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources". Montana Constitution, Article IX, Section 1. Pursuant to that mandate, the Legislature enacted the Montana Environmental Policy Act (MEPA) (Title 75, Chapter 1, M.C.A.) which requires, to the fullest extent possible, that all state actions that may impact the natural environment be throughly considered prior to action. The actions of the 1993 Legislature to revise the game farm laws to fully implement MEPA requirements, and the Department's decision to apply the new requirements to the Wallaces' pending application and any other such pending applications, are proper and necessary actions to implement the actions of the Legislature and, ultimately, to enforce the mandate of the people expressed in the state's Constitution.

In *Cabinet Resource Group v. Dept. of State Lands (1982)*, Judge Bennett concluded that MEPA is substantively based not only on federal law but on the Montana Constitution. He notes:

> The fact that Montana has given constitutional status to maintenance of a clean and healthful environment demonstrates the heightened importance which must be placed on actions which affect the environment in this state. There is no comparable constitutional protection afforded federal actions. The conclusion we reached above as to the impact of MEPA was based largely on federal interpretation of NEPA. The presence of these additional constitutional provisions provides authority for even stronger environmental protection in this state. See Tobias and McLean, Of Crabbed Interpretations and Frustrated Mandates, 41 Mt. L. Rev. 177 (1980). In the event we could not find support for our conclusion in NEPA interpretation, the combination of MEPA and the above constitutional sections would provide the necessary authority.

Judge Wheelis, in *Friends of the Earth v. Dept. of State Lands (1980),* determined that MEPA recognizes that each citizen is entitled to a healthful environment. He notes:

> The Montana Environmental Policy Act (MEPA), §75-1-103(3) MCA 1979, recognizes each citizen entitlement to a healthful environment and the Montana Constitution Article II, § 3, guarantees the inalienable right to a "clean and healthful environment."

Supreme Court Defines the Right to a Clean and Healthful Environment in Montana Environmental Information Center v. Dept. of Environmental Quality

Background

On October 20, 1999, the Montana Supreme Court, in *Montana Environmental Information Center v. Dept. of Environmental Quality*, 296 M 207, 988 P2d 1236 (1999), for the first time issued an opinion construing the right to a clean and healthful environment contained in Article II, section 3, of Montana's Constitution, and the environmental nondegradation policy established by Article IX, section 1, of Montana's Constitution. The case instantly generated statewide headlines and produced a number of questions from the general public and the EQC members themselves about the interplay and impact between these constitutional provisions as now defined by the Supreme Court and MEPA. The EQC requested two expert panel discussions on the following issues:

- **T** In light of the Supreme Court's decision, is MEPA now considered substantive?

- **T** In light of the decision, would MEPA increase or decrease potential litigation?

What follows is a summary of the information that the EQC heard on the subject.

A Summary of Montana Environmental Information Center v. Dept. of Environmental Quality Court Decision

This case involved a discharge from an mine exploration pump test well of deep aquifer ground water to the alluvial aquifer of the Blackfoot River with the potential for migration to the surface waters of the Landers Fork of the Blackfoot River. The discharged ground water contained concentrations of arsenic (a known carcinogen) that were in concentrations greater than the receiving water found in the Landers Fork and Blackfoot River alluvium. In 1995, the Montana Legislature amended the Water Quality Act to exclude certain exploration activities (including test wells) from review pursuant to the Act's nondegradation policy (75-5-317(2)(j), MCA).

However, the Board of Environmental Review had promulgated a rule that sets out criteria that determine whether certain activities will result in nonsignificant changes to the existing water and therefore do not require a nondegradation review under the Water Quality Act (ARM 17.30.715(1)(b)). Under this rule, discharges containing carcinogenic parameters at concentrations less than or equal to the concentrations of those parameters in the receiving water do not require a nondegradation review.

Because there was an increase in arsenic levels in the receiving waters, because any increase in a carcinogen according to the DEQ's own rule is a significant impact requiring review under Montana's policy of nondegradation, and because the Legislature arbitrarily excluded this discharge from nondegradation review, the Supreme Court concluded that the constitutional right to a clean and healthful environment and to be free from unreasonable degradation of the environment was implicated in this case. The Court's decision is limited to this specific statutory exclusion (75-5-317(2)(j), MCA) as applied to the facts in this case.

The importance of this case is found in what the Court both concluded and did not conclude. The Court held that:

- **T** There is a fundamental right to a clean and healthful environment and it includes the concept of being free from "unreasonable" degradation.

- **T** The state had admitted that there was significant degradation, which equates to unreasonable degradation in this case, because of a DEQ rule

that says that any increase in a carcinogen above background levels in the receiving water is significant.

- **T** When a fundamental right is implicated, the state must show a compelling state interest in action that implicated the right.

- **T** A fundamental right is not only enforceable for state actions but for private actions as well.

The Court did **NOT** conclude that:

- **T** The statute was unconstitutional on its face.

- **T** There is a fundamental right to "no" adverse change in the environment.

- **T** For pollutants other than carcinogens, the right to a clean and healthful environment is implicated any time there is a release in a concentration that is greater than what is found in the receiving water.

The Supreme Court remanded the case to the District Court to determine whether the exclusion in section 75-5-317(2)(j), MCA, for mining exploration activities is constitutional under the rigorous strict scrutiny test that evaluates whether the Legislature had a compelling state interest in enacting the exclusion.

In Light of the Supreme Court's Decision, is MEPA Now Considered Substantive?

To clarify this question, does the Supreme Court's decision in this case require the state in every instance to choose the most environmentally protective alternative revealed in a MEPA analysis? The short answer to this question is "no, not yet". This case did not involve a MEPA issue. It is speculation at best to say what the Supreme Court would conclude on this issue.

In Light of the Decision, Would MEPA Increase or Decrease Potential Litigation?

The panel of state agency counsel and plaintiff attorneys split on this question. Legal counsel for the Departments of Natural Resources and Conservation (DNRC) and Transportation (MDT) both agreed that litigation will increase. DNRC legal counsel noted that MEPA and the Constitution impose separate obligations upon state agencies. MEPA does not implement the constitutional right to a clean and healthful environment. The dimensions of that constitutional right will be developed by case law.

Counsel for MDT noted that some agency decisions are not given deference. A problem with the Supreme Court's decision is imprecise language. In the short term, this Supreme Court decision will cause increased litigation.

Legal counsel for the Departments of Environmental Quality (DEQ) and Fish, Wildlife, and Parks (FWP) and the two plaintiff attorneys agreed that effective implementation of MEPA should decrease the potential for litigation under the Supreme Court's holding that people have the fundamental right to a clean and healthful environment free of unreasonable degradation. However, the DEQ legal counsel cautioned that whether MEPA litigation in fact decreases in practice or not is speculative. Legal counsel for DEQ also noted that the Court held that the balancing process for determining degradation under the Water Quality Act was reasonable. Other regulatory statutes do not have this type of balancing process to determine whether degradation of the environment is reasonable. MEPA provides such a process. DEQ counsel did note that one area in which litigation may increase is in situations in which agencies do not have time to prepare an EIS. The agency may point out impacts without the ability to adequately mitigate those impacts. This could implicate a fundamental right.

Legal counsel for FWP noted that MEPA has the potential for decreasing litigation. It is the process by which agencies can implement a clean and healthful environment.

The plaintiff attorneys noted that restricting the scope of MEPA would be beneficial to plaintiffs. A robust MEPA process, according to the plaintiff attorneys, will provide information to protect agency decisions from a constitutional challenge. The plaintiff attorneys also noted that legislative blanket exemptions without some environmental review via a specific statute or, lacking that, via MEPA raises a red flag under the constitutional rights defined by the Supreme Court.

New Evidence Issues in MEPA Litigation

New evidence, for the purposes of this analysis, is factual, opinion, or testimonial information allowed into the judicial record by a District Court that was not in the agency's administrative record. It is important to realize that individuals and attorneys differ on what constitutes the definition of "new evidence".

Evidence issues in some MEPA cases have been controversial. A basic tenant of administrative law states that, in general, agencies should have the chance to consider information about a project at the administrative stage of a project or proceeding and that a protesting party should not be allowed to present new evidence in a legal proceeding. Administrative agencies therefore often protest when the person bringing the lawsuit attempts to provide additional evidence that was not considered by the agency. For those protesting an agency action in court, the counterargument to limiting the introduction of new evidence is that the time period for citizens to present their evidence is limited. For

example, an agency may spend 2 years preparing an EIS and give the public 30 days to comment. It is contended that it is difficult for a citizen to conduct the type of scientific studies necessary to generate detailed information in the 30-day time limit. Citizens therefore often attempt to provide a court with additional information during legal proceedings.

Federal courts have developed detailed analyses that they apply on a case-by-case basis to address new evidence issues. The Montana Supreme Court has not directly addressed this issue.

During the 1999 legislative debates on House Bill No. 142, which limits a court's ability to review evidence that was not presented at the administrative level during the MEPA review process, it was argued that new evidence (not in the agency's administrative record) introduced in District Court placed the court in a position of a trier of fact as to whether a project should go forward or not. The proper function of the court, it was argued, should be strictly a review function. The MEPA Subcommittee requested a panel discussion on this issue that included attorneys from DEQ, FWP, DNRC, and MDT and a plaintiff's attorney. The panelists were asked whether the introduction of new evidence is a problem (**Table 4-4**).

Table 4-4. Is New Evidence a Problem?

Question	DNRC	DEQ	FWP	MDT	Plaintiff Attorney
Is new evidence a problem for the agency?	Yes	No	No	Yes	No

Counsel for MDT noted that new evidence issues can be somewhat problematic and there is not much legislative guidance on what is included in the administrative record.

FWP counsel said that new evidence issues had not been a problem. Discovery opportunities are available during the judicial process, so there should not be the element of surprise.

DNRC counsel noted that new evidence issues are a serious problem and that on a number of occasions, evidence had been deliberately withheld at the administrative level and introduced in the District Court. People have saved studies, testimony, or allegations about the adequacy of an EIS until the matter was in District Court. This claim was disputed by the plaintiff's attorney.

Counsel for DEQ said that there were four cases that involved new evidence issues. In each of the cases, the court determined that the agency had conducted a sufficient analysis. While there was disagreement between experts in those cases, the court found for the agency.

The plaintiff's attorney emphasized that the administrative record should not be unduly restricted. He noted that agency experts have worked on the EIS for quite some time, but that the public has only 30 days to get its evidence into the record. The issues need to be raised. Withholding evidence until the District Court proceedings is not recommended because this reduces the integrity of the administrative record.

The plaintiff's attorney also felt that the Legislature should not try to legislate how courts should address evidence issues. Courts are best equipped to deal with evidence issues on a case-by-case basis, which they do in many different contexts. There are some cases when a plaintiff should be barred from introducing new evidence because it should have been presented to the agency. On the other hand, there are situations where it was impossible to get information during the administrative proceedings, and in the interests of fairness, the plaintiffs were allowed to present it in court.

The EQC directed its staff to research case files to determine whether new evidence was in fact raised as an issue and whether it was a problem. Based on that review, the EQC staff concluded that new evidence was not a significant issue in MEPA litigation. The EQC staff also found that when new evidence had been raised in court, it was an issue that both the state and plaintiff counsel raised against the other.